

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

Policies and Rules Governing Interstate)	
Pay-Per-Call and Other Information)	CC Docket No. 96-146
Services Pursuant to the)	
Telecommunications Act of 1996)	

Comments of Pilgrim Telephone, Inc.

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May 12, 2003

SUMMARY

Pilgrim in its comments presents four arguments about the Commission's proposed rules and the direction the Commission should take in this rulemaking. First, many of the Commission's key regulatory proposals are at odds with the amendments to Section 228 of the Communications Act enacted seven years ago, and with the central legislative policies underlying those amendments. Now that the Commission has apparently decided to return to the rulemaking it launched in 1996, its first order of business should be to achieve greater success in aligning its proposed rules with the terms of the statute and with clear legislative intent.

Second, The Commission's proposed rules, in addition to contradicting the statute, would impose unwarranted and substantial burdens on information service providers. These burdens would cause unnecessary and significant disruption in a highly competitive market, to the detriment of consumers who use these services as well as to the industry itself.

Third, numerous changes have taken place in the market for information services since the passage of the 1996 amendments. Underlying service providers have ceased making the building blocks for many information services available, or available only at costs which are far above the reasonable cost of providing service. Many or most carriers now refuse to bill for 900 services, or charge rates for the billing and collection of calls which far exceed the cost of either billing and collection, and sometimes even the cost of the underlying service to consumers. Because of the ongoing difficulties associated with 900 number services, it is imperative for the Commission to prescribe rules that reflect the non-900 delivery platforms adopted by Congress.

Finally, Pilgrim believes that it would not be appropriate for the Commission to attempt to prescribe final rules in this proceeding based upon the rules it proposed nearly seven years ago. Sound public policy and procedural fairness dictate that the Commission should use the record compiled seven years ago, together with this new record, to fashion a new set of proposed rules. It would be extraordinary for the Commission to take its proposal from 1996 and attempt to promulgate final rules without giving parties an opportunity to review and comment upon the Commission's tentative assessment of how intervening events should be taken into account.

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Pilgrim Telephone, Inc. (Pilgrim), by counsel, hereby submits its Comments in the above-captioned proceeding in response to the Commission's request for comments on its proposed rules.¹

I. INTRODUCTION

The current rule making originated with a Notice of Proposed Rule Making issued by the Commission in July of 1996.² The NPRM was issued in response to changes made by Congress in the Telecommunications Act of 1996.³ While numerous parties,

¹ Public Notice, "The Consumer & Governmental Affairs Bureau Seeks Comment To Refresh the Record on the Commission's Rules Governing Interstate Pay-Per-Call & Other Information Services," CC Docket No. 96-146, DA 03-807, released Mar. 17, 2003.

² In the Matter of Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services Pursuant to the Telecommunications Act of 1996, CC Docket No. 96-146, Order and Notice of Proposed Rulemaking, FCC 96-289, released July 11, 1996 (NPRM).

³ P.L. 104-104, Sec. 701, 110 Stat. 56 (1996) (codified at 47 U.S.C. § 228).

including Pilgrim, filed extensive comments in that original proceeding, the Commission has never adopted new rules which conform with the changes made in the statute.

The result of the Commission's inaction has been that its rules have only limited force and effect, as they do not conform with the statutory changes made by Congress. No guidance has been provided to the industry by the Commission since 1996, with the exception of the interpretative cases discussed below. At the same time, the industry has seen a substantial increase in the use of 800 collect call back, with no oversight or action being taken by the Commission, in direct violation of the statutory amendments of 1996.

Since the passage of the 1996 amendments, numerous changes have taken place in the market for these services. Underlying service providers have ceased making the building blocks for many information services available, or available only at costs which are far above the reasonable cost of providing service. Most carriers have ceased providing 900 number billing, or the service altogether, while others have increased the charges levied upon service providers for 900 number service to non-economic levels, destroying the viability for this form of per-per-call provision for most services and providers. The growth in competitive local exchange carriers (LECs) and cell phone usage, neither of which supports 900 access, has also caused 900 number service provision to become obsolete.

The Commission's new rules should take into account the fact that many or most carriers now refuse to bill for 900 services, or charge rates for the billing and collection of calls which far exceeds the cost of either billing and collection, and sometimes even the cost of the underlying service to consumers. Due to the loss of the majority of 900

number services, the Commission’s regulations should reflect the non-900 delivery platforms adopted by Congress, and preserve these in the rules.

II. DISCUSSION

A. Specific Amendments Made in 1996

In 1996 Congress made substantial amendments to the Telephone Disclosure and Dispute Resolution Act (TDDRA). Two of the most extensive changes made to the TDDRA were the deletion of the tariffed services exemption and the specific prohibition of 800 collect call back. At the same time, Congress expanded the permissible billing and dialing methods available to service providers, including rules surrounding the manner of providing information services over 800 numbers, other toll free numbers and other numbers generally, when offered and billed pursuant to two specific presubscription scenarios — one requiring advance written notification of terms and conditions and consent, and the other requiring oral disclosure and consent on each call.

These changes were made because Congress concluded that service providers were circumventing the rules by tariffing information services, or providing information services through expensive collect and international calling patterns. As a consequence, it closed these perceived loopholes. Congress removed the tariffed services exemption — tariffing a service no longer makes it exempt from the rules. Congress also prohibited the practice of following a call to an 800 number with a collect call to provide the service. No longer was it lawful to capture the Automatic Number Identification (ANI) from a consumer calling a toll free number, and then to use the ANI to originate a collect call back to that consumer for the delivery of service. Certain other “conversion” practices were prohibited, as well, such as “converting” a toll free call to a paid call during the course of the call.

Under the Federal Trade Commission's (FTC's) statute, Congress provided that the FTC shall prohibit parties providing pay-per-call services from advertising "an 800 number, or any other telephone number advertised or widely understood to be toll free, from which callers are connected to an access number for a pay-per-call service."⁴ Congress also provided that the FTC would enact rules that prohibited providers of pay-per-call services from providing those services "through an 800 number of other telephone number advertised or widely understood to be toll free."⁵

B. The Commission Should Not Prescribe Rules That Differ Based Upon the Content of Various Information Services.

Pilgrim renews and reemphasizes here an important concern it first expressed in its initial comments in this proceeding, namely, that the Commission must be careful to craft rules establishing requirements for pay per call services that are neutral with respect to the content of communications provided by those services.⁶

One reason for this is that doing so will be consistent with a core Commission policy that has flourished since the NPRM in this proceeding was released nearly seven years ago. Specifically, the Commission has given great weight in numerous rulemakings to the importance of permitting market forces and consumer choice to shape and determine the success or failure of service offerings in the communications marketplace. The most direct and effective means for the Commission to achieve that goal in the context of pay per call services is to adopt rules that do not pay any heed to content. Rather than fixating on disparate (and inherently discriminatory) rules that

⁴ 15 U.S.C. § 5711(a)(1)(I).

⁵ 15 U.S.C. § 5711(a)(2)(F).

⁶ Pilgrim 1996 Comments at 3-5.

distinguish between “adult services” and other types of pay per call services, the Commission, consumers, and the pay per call industry would be well served by the Commission’s development of fair and effective rules that apply across the board to all types of information services — not targeted solely at an arbitrary subclass of “pay per call” services.

Another reason the Commission should be cautious in addressing the issue of content is that the statute that forms the basis for this proceeding and for the Commission’s development of pay per call rules pointedly refrains from enacting any specific mandate relating to content. It is reasonable to conclude that a principal basis for this congressional reticence was concern that any such mandate would run afoul of the First Amendment to the U.S. Constitution. Action by the Commission that would result in more onerous and restrictive requirements being imposed upon “adult services” would raise these constitutional concerns.

Other problems would arise if the Commission were to seek to avoid these constitutional issues by fashioning restrictive and burdensome requirements applicable to the entire pay per call industry. While the motive of such an action would be deal a blow to “adult service” providers, the effect would surely be to impede the development and growth of all pay per call services. Such an approach would be contrary to sound and defensible public policy, especially since it would be at odds with the Commission’s professed desire to ensure that the marketplace and consumer demand, rather than regulatory fiat, will be the arbiters of the success of communications service providers.

C. The Congressional Amendments to Section 228 of the Act Present a Balanced Approach and a Roadmap for the Commission's Rules To Follow.

The Commission's attempt in this proceeding to develop a regulatory framework for the provision of pay per call services must be informed by an understanding of the balanced approach that underlies the congressional action in amending Section 228. The new statutory regime must be assessed both in terms of what Congress did and what Congress did not do. For example, Congress acted to eliminate the tariffed services exemption that, in the judgment of Congress, had unreasonably impaired effective regulatory oversight with respect to the operations and offerings of the pay per call industry.

Congress also acted to impose tough requirements to ensure that pay per call providers furnish product and service information to potential customers that is sufficient to enable informed consumer choices. Finally, Congress acted to set up a new statutory structure that opens the way for increased flexibility for carriers and service providers to design and provide a variety of dialing and billing patterns for information and entertainment services.

At the same time, there are two significant actions that Congress did *not* take. Congress refrained from requiring that all information and entertainment services must be provided via the use of 900 numbers. In addition, Congress did not require that pay per call providers cannot provide any service to a customer unless that customer makes a written request in advance of receiving the service.

It is the responsibility of the Commission, in implementing the amendments to Section 228, to stay on the road mapped out by Congress, and to avoid wandering down paths of regulatory requirements that were not charted by Congress. The amendments to

Section 228 reflect rational and reasonable judgments by Congress intended to protect and serve consumers while at the same time promoting the growth and expansion of a robust pay per call industry. The Commission's rules must serve those same objectives.

D. The Commission Should Avoid Broad Prohibitions Intended To Curtail Migration by Pay Per Call Providers to New Dialing and Billing Patterns.

One uncharted regulatory path that the Commission should be wary about entering involves attempts to curtail migration by information service providers who seek to avoid new restrictions in Section 228 and the Commission's rules. In sounding this cautionary note, Pilgrim at the same time stresses that it supports efforts by the Commission to curb the machinations of any unscrupulous operators whose sole intent is to insulate their operations from statutory and regulatory requirements.

But the Commission should also keep in mind that there are a variety of legitimate factors leading pay per call providers to attempt to shift their calling and billing patterns away from a dependence upon 900 service provision and access. The task for the Commission centers on the design of rules that prohibit migration intended to avoid regulatory requirements while at the same time avoiding unwarranted restrictions that would interfere with the implementation of new dialing and billing patterns that is grounded in sound economic reasons and not any attempt to "game" the system for purposes of skirting the statute and the Commission's rules.

For these reasons, Pilgrim reiterates its opposition to extension of the toll free dialing restrictions to other non-toll free dialing patterns.⁷ This type of regulatory restriction leads the Commission down the path of attempting to anticipate each and

⁷ *Id.* at 6.

every new type of dialing and billing pattern in the hope that prophylactic prohibitions against all these new patterns will better ensure compliance with the statute. But such an approach by the Commission inevitably will stifle the legitimate provision of services. The Commission's commitment to the operation of marketplace forces and to the promotion of consumer choice compels the Commission to develop a regulatory approach to the dialing and billing pattern migration issue that minimizes intrusion upon the legitimate operations of pay per call providers.

An important part of a solution that both prevents migration by unscrupulous operators but also does not impede migration for legitimate business purposes should be a decision by the Commission to mandate access to 900 blocking request information. Such a mandate would serve consumers because pay per call carriers using new dialing and billing patterns would be able to impose blocking in circumstances in which doing so would comport with a customer's wishes. The mandate would also facilitate, rather than impede, the provision of pay per call services that are designed to avoid problems associated with the use of 900 calling patterns but are not intended to avoid regulatory requirements.

E. The Commission Must Act To Remove Unfair Advantages Enjoyed by Local Exchange Carriers in Their Provision of Information Services.

It is important for the Commission to recognize that "toll free" numbers include a variety of services in addition to 800 service. This fact is significant because it means that the Commission, in order to protect consumers to the full extent intended by the statutory mandate and in order to ensure that all carriers and service providers are able to compete fairly in the offering of similar services, must design rules that apply requirements evenly across the entire landscape of "toll free" services.

The Commission's obligation to prescribe rules that apply fairly and comprehensively to all "toll free" services is particularly important in the case of services provided by LECs.⁸ The point here is that requirements relating to written presubscription and the use of calling cards or credit cards to obtain service must be made to apply to a wide range of "toll free" services. The fact that the LECs continue to enjoy exclusive access to their customer billing and collection databases gives them a unique advantage with regard to access to customer information and the ability and opportunity to contact consumers.

Pilgrim urges the Commission either to erect barriers that prevent the LECs from leveraging their exclusive access to customer information as a means of gaining an unfair advantage in the provision of pay per call services, or to require the LECs to make customer information and billing and collection services available on a non-discriminatory basis to other pay per call providers. Either step would assist in canceling out an unfair competitive advantage enjoyed by the LECs.

F. The Commission Should Not Adopt a *Per Se* Rule Regarding Carriers' Compensation to Other Service Providers, Advertisers, and Other Entities.

Pilgrim continues to oppose the Commission's proposal to impose a *per se* rule that any form of payment from a carrier to another entity providing or advertising a service, or any reciprocal arrangement between the carrier and the other entity, will automatically be treated as evidence that the carrier's charges to end users exceed the carrier's transport costs.⁹

⁸ Examples of these services are discussed by Pilgrim in its initial comments. *See id.* at 7-8.

⁹ *See id.* at 9, quoting NPRM at para. 48.

The Commission's proposed approach casts too wide a net. A literal reading of the proposed rule, for example, would seem to prohibit direct dialing for time and weather information. There are also many other examples in which carriers have compensation arrangements with call aggregators, universities, hospitals, hotels, and airports.¹⁰

Pilgrim believes that, rather than attempt to retain the proposed *per se* rule by building in numerous exemptions to the rule for services that the Commission deems "acceptable" for one reason or another, it would be more appropriate for the Commission to abandon the *per se* rule. In lieu of such a *per se* rule, the Commission should be prepared to examine the facts of particular cases to determine whether all the evidence surrounding the compensation arrangements supports a conclusion that the arrangement is intended to impose unsupported and unreasonable charges on end user customers.

G. The Commission Should Adopt Rules Which are Consistent With Its Interpretations in Recent Cases.

Although the Commission has failed to move forward with any rulemaking action since Congress amended Section 228 in 1996, the Commission has at various times sought to interpret the legislation. We summarize in the following paragraphs some of the key interpretations that have been developed by the Commission, and we recommend that the Commission now take the steps necessary to codify these interpretations as part of its rules implementing Section 228.

The collect call back prohibition in the statute is limited to the use of 800 numbers in direct call back scenarios, and does not prohibit the use of collect calls generally, or in conjunction with other calling patterns, and does not prevent the use of normal common

¹⁰ See Pilgrim 1996 Comments at 10.

carriage in the delivery of, and charging for, such calls so long as the charges do not exceed common carrier charges. The prohibition does not address, either explicitly or implicitly, whether the use of non-toll free calls in combination with return collect calls to deliver information is proper. We believe that Commission rulings issued since the 1996 amendments on related business relationships between carriers and information service providers, in combination with the TDDRA's silence on the relationship between non-toll calls and return collect calls, indicates that calling patterns that use non-toll free numbers in conjunction with collect calls would not be illegal, either under the specific provisions of the TDDRA or under the general anti-fraud provisions of Section 45 of the FTC Act.

Use of common carriage to deliver and charge for information service calls should not be prohibited or disturbed absent active ownership relationship between the carrier and the information service provider, or collaboration. Collaboration arises when a service provider and a carrier enter into a relationship which forces a consumer to use a particular carrier to carry an information service call, where the charge for the call may be higher than that usually charged by the consumer's own carrier. The carrier compensates the information service provider for the increase in call traffic by paying it a commission. This practice is heavily used in international calling patterns, where per minute costs tend to be high, but also occurs in various domestic calling situations.

Recent Commission decisions have engaged in specific discussions of the problems related to sweetheart deals between carriers and service providers. The Commission has previously determined that calling patterns in which the information service providers and common carriers conspired to limit a consumer's choice of carrier

to a particular high cost provider, with the common carrier paying a commission to the information service provider for generating the call traffic, was an unjust and unreasonable practice under Section 201(b) of the Communications Act.

In particular is a Commission opinion letter¹¹ that stated that “[t]hrough payments to an information provider..., a carrier would abandon objectivity and acquire a direct interest in promoting the delivery of calls to a particular number for the provisions of a particular communication.” In the Marlowe Letter, the Common Carrier Bureau concluded that commission payments from carriers to information service providers violated Section 201(b) of the Communications Act.

Recent developments have limited the Commission’s prior interpretation, however. In an order released this past August,¹² the full Commission expressly overruled the Marlowe Letter, to the extent inconsistent with the order, and established new Commission precedent. The Commission found that so long as a common carrier provides service indifferently and indiscriminately to all customers and interconnecting carriers, it does not otherwise violate the Communications Act by paying commissions to information service providers for having generated traffic over the carrier’s network. The Commission found that there was no unlawful interest between the carrier and the information service provider, even when the agreement between the carrier and provider required the carrier to engage in certain marketing efforts and to block intrastate calls to the information service provider.

¹¹ Ronald J. Marlowe, 10 FCC Rcd 10945 (CCB-ED 1995) (Marlowe Letter).

¹² AT&T Corporation v. Jefferson Telephone Company, 16 FCC Rcd 16130 (2001).

While the AT&T Corporation case involved AT&T's payments of access charges to Jefferson Telephone, the recognition and endorsement of commission payments in conjunction with information services is significant. The Commission's opinion follows a long line of cases where the Commission has recognized the payment of commissions to parties for the generation of call traffic. The Commission did not criticize any aspect of Jefferson Telephone's practices, or those of the underlying information service provider. Based on these decisions, the Commission should now codify a rule stating that such commission structures do not inherently change the communications common carrier nature of the call, even when used to provide information service delivery.

In another case in which AT&T raised both unlawful conduct under Section 201(b) and violations of Section 228, the Commission ruled on the Section 201 issues, and declined to address the Section 228 issues as moot. In *Total Telecommunications*,¹³ the Commission found that the relationship between Total Telecommunications Services and its affiliate, Atlas Telephone Company, was a sham designed to create increased access charges for the sole purpose of creating higher commission payments to Audiobridge, an information service provider that was the only customer of Total. The basis of the Commission's determination was that Atlas and Total were not competitors or independent, and found that the arrangement and the charges levied on AT&T for access were unjust and unreasonable.

The Commission also found that it would be proper for Atlas to charge the industry NECA rate for these calls, and did not otherwise criticize Audiobridge's delivery

¹³ Total Telecommunications Services, Inc., et al v. AT&T Corporation, Memorandum Opinion and Order, FCC 01-84, File No. E-97-003, released March 13, 2001 (*Total Telecommunications*).

of and compensation for information services under the commission arrangement. The Commission concluded that claims that the arrangement violated TDDRA were moot, but it undertook no separate enforcement of the TDDRA, or criticism of that aspect of the arrangement.

These interpretative decisions post-date both the amendments enacted by Congress, and the Commission's original NPRM. Pilgrim requests that the Commission codify this precedent into its new rules. Specifically, Pilgrim asks the Commission to determine that so long as a common carrier is not providing the actual content during the charged part of a call, that the call itself is not a pay-per-call service and is not subject to the TDDRA regulations. Such calls would be subject to all of the other consumer protections of the Communications Act. Pilgrim also requests that the Commission recognize that when audiotext is provided by an audiotext provider with no direct or indirect ownership relationship with the carrier for the calls, that the common carriage nature of the calls is not disturbed, and that the service delivery is not pay-per-call.

H. The Commission Must Ensure That Information Service Providers Are Prevented From Designing Services for Purposes of Evading the Commission's Interstate Jurisdiction, and That States Are Not Permitted To Claim Jurisdiction Over Interstate Services.

Pilgrim believes that an important step in the Commission's implementation and enforcement of the revisions to Section 228 of the Act should be a finding by the Commission that any service available on an interstate basis is subject to the Commission's jurisdiction. In this regard, the Commission should be alert to attempts by service providers to design services that appear to be intrastate in nature in order to avoid the reach of the Commission's jurisdiction. The Commission should make it clear that

any service that handles any interstate traffic is interstate in nature and subject to the Commission's exclusive jurisdiction.

Pilgrim also continues to be concerned that states will seek to encroach upon the Commission's jurisdiction by enacting statutes and prescribing regulations that are intended to, or have the effect of, restricting or impeding the provision of interstate pay per call services. The Commission's explicit pronouncement in this proceeding that any such services with an interstate component are subject to its exclusive jurisdiction would signal to the states that the Commission intends to occupy the field and oust any states from seeking to regulate the provision of interstate offerings by pay per call service providers.

I. The Commission's Proposed Rules Reveal Serious Failures To Follow the Direction of Congress and Comply with Congressional Intent.

A fundamental flaw of the Commission's proposed rules, in Pilgrim's view, is that the rules fail to perceive and embrace a delicately balanced regulatory framework created by Congress in its revisions to Section 228. In this section, we expand upon our views regarding congressional actions and intent, as those views are outlined in an earlier section of these Comments, and we then examine the instances in which the Commission's proposed rules are at odds with the statutory framework.

1. The Choices Made by Congress in Amending Section 228 Sought To Balance a Number of Policy Goals.

In reviewing the congressional objectives in amending Section 228, we will first examine the alternative billing methods permitted by Congress, and we will then turn to the issue of whether Congress intended to require written agreements in connection with the provision of pay per call services to end user customers.

a. Congress Decided That Presubscription Agreements Will Not Require Any Execution by Customers.

Congress authorized a presubscription billing method and specified that a written agreement must be delivered to the consumer before the service provider can impose any charges. Congress established a number of safeguards applicable to the presubscription billing method. For example, the written agreement submitted to the consumer must contain information specified in Section 228(c)(8), including rates, the name, address, and regular business telephone number of the information provider, notification of rate changes, and the subscriber's choice of payment methods.

The statute also requires issuance of a personal identification number (PIN) to the customer to guard against any unauthorized use of the account. It is important to emphasize, however, that Congress rejected any requirement that the customer must execute the agreement, deciding instead that the advance provision of information to the consumer about the terms and conditions of the service would provide consumers with sufficient protection.

b. Congress Decided Not To Impose Advance or Written Agreement Requirements in the Case of Customers Choosing To Use Calling Cards To Pay for Information or Enhanced Services.

In permitting the use of calling cards — the second method identified by Congress for accessing information services over toll free numbers — Congress refrained from imposing any advance or written agreement requirements as a prerequisite to providing services to calling card customers. Unlike the presubscription method, the calling card method permits information services on 800 numbers without any preexisting agreement.

It is also important to understand the mechanics of calling card use, as authorized by the amendments to Section 228. Specifically, there is no need for an actual card or other kind of document to be issued by the carrier in order to provide service to end user customers via the calling card method. So long as the carrier issues a unique identifying number or code to the customer that allows for billing to the customer's telephone number, then the customer may originate calls from any location through use of the calling card. This can be done without any other documentation or advance subscription.

c. The Dual Billing Methods Authorized by Congress Recognize and Seek To Accommodate Current Trends in Carriers' Methods for Soliciting and Acquiring Customers.

It remains the case today that carriers rely upon the virtually instant issuance of calling cards over the telephone (without any other writing or other documentation) as one means of providing service to pay per call customers.¹⁴ The Commission's rules must take account of the fact that Congress has enacted a statutory framework that does not intend to prohibit or impair the opportunity for customers to make an informed, instantaneous, and electronic decision to be charged for a pay per call service. While Pilgrim agrees with the conclusion that Congress intended to protect consumers from unwanted charges related to toll free calls, we also assert that there was no congressional intent to bar or delay the imposition of charges in cases in which the calling party has willingly entered into the pay per call transaction.

Congress made three straightforward and reasonable choices in authorizing the use of calling cards for pay per call services. In doing so, Congress decided against imposing any system of pre-billing restrictions on the use of calling cards. The first

¹⁴ See Pilgrim 1996 Comments at 15-17.

congressional choice was to make sure that a calling party would be given a clear understanding of when a toll free call would turn into a call for which a charge would be imposed. Congress accomplished this by requiring the carrier to provide disclaimers and to enter calling card information before imposing any charges. But Congress rejected any requirement that these calls could not be made and billed without a preexisting agreement.

The second choice made by Congress was to avoid any requirements that would prevent or impair consumers from deciding to incur a charge for their calls in an easy and rapid manner, once the consumers have been supplied with sufficient information to ensure that they understand that a charge will be imposed.

Finally, Congress made the choice that there should not be any governmental interference in the business judgments of pay per call service providers so long as sufficient customer protections are established and the carriers are willing to assume the non-collection and other risks associated with the use of calling cards as payment mechanisms for pay per call services.

Congress, in devising billing methods for pay per call services, thus struck a balance designed to ensure that consumers are protected while service providers are permitted to provide service to customers with a minimum of delays associated with billing-related requirements. Pilgrim believes that Congress has adopted an effective means of serving these two goals. It thus becomes the responsibility of the Commission to prescribe rules that reflect these core congressional principles and choices, and that are effective in implementing the congressional mandate.

2. The Commission Must Focus on Revising Its Proposed Rules To Eliminate Significant Instances in Which the Proposed Rules Ignore or Contradict the Statutory Scheme and Congressional Intent.

The NPRM in many respects evidences a laudable effort by the Commission to create a regulatory framework that would anticipate and facilitate competitive developments in the pay per call industry by uniformly applying its rules and requirements to different types of calling patterns and billing mechanisms. As we have described, however, even this effort is plagued by the difficulties posed in attempting to provide for every contingency and has resulted in proposed rules that sweep all information services within their coverage and would result inadvertently in stifling competitive initiatives and crippling the marketplace developments that otherwise would emerge from the policies and statutory framework established by Congress.

A more fundamental difficulty with the NPRM is that, with regard to a number of key issues affecting the way in which pay per call providers will interact with their customers and provide their services, the NPRM strays from the regulatory path established by Congress and in fact proposes rules that would be directly at odds with the statutory framework. Congress has taken clear steps to liberalize the options available for accessing and billing information services. The Commission's proposed rules would undercut these legislative policies. Congress also chose to rely upon full and complete disclosure as the chief means of protecting consumers using pay per call services. Again, the proposed rules have ignored this congressional policy choice.

Compounding these difficulties engendered by the Commission's proposed rules is the fact that the proposed rules have now been on the table for nearly seven years. During that time the pay per call industry has been left with virtually no guidance with

regard to whether business activities that carriers might choose to initiate will be deemed to be permissible under the terms of the statute. The Commission, in ignoring its responsibility to implement and administer the provisions of Section 228, has erected a roadblock of uncertainty that has had substantial negative effects on the pay per call industry.

In Pilgrim's view, the Commission's responsibility for creating these difficulties would be compounded if the Commission were to take the extraordinary step of now prescribing rules, based on this "refreshed" record, without updating its proposals and giving parties an opportunity to comment upon proposed rules that take this new record into account. Although the Commission did not announce how it plans to proceed in the Public Notice soliciting this new round of pleadings, it should rectify that lapse by indicating through another Public Notice that the next step in this proceeding will be a Further NPRM that fashions proposed rules that are informed by the events of the past seven years and also address the deficiencies in the initially proposed rules that Pilgrim and other parties have identified.

Given the fact that the pay per call industry and the users of pay per call services have been kept in the dark by the Commission for so long, Pilgrim is not enthusiastic about suggesting that there now should be further delays. Pilgrim believes, however, that there is a strong case for concluding that the best way for the Commission to ensure faithful implementation of the statute and a fair regulatory framework for consumers and the pay per call industry is to give interested parties an opportunity to have the benefit of reviewing the Commission's updated thinking about how the statute should be implemented and enforced, and to comment upon a new set of proposed rules before

those rules are finalized. A failure by the Commission to follow such a course will only extend further the Commission's disservice to an industry that has been waiting patiently for the Commission to meet its regulatory responsibilities.

a. The Commission's Proposal That Presubscription Agreements Must Be Executed in Writing Would Create a Requirement That Was Rejected by Congress.

The NPRM proposes that presubscription agreements between customers and information service providers must be executed in writing.¹⁵ There are two problems with this proposal. First, it directly contravenes the choice made by Congress regarding this issue. Congress considered imposing such a requirement, whereby an information service provider would be required to secure a consumer's signature on a written agreement before billing for any calls, but Congress rejected this approach. Congress concluded that it is sufficient for the service provider to deliver a written agreement to the consumer. The Commission does not have any authority to go beyond the terms of the statute by adding a requirement that Congress specifically decided to exclude.

Moreover, even if it could be argued that the Commission does have authority to take such an action, imposition of such a requirement would be bad public policy. Requiring a consumer's written signature would have the obvious effect of burdening the delivery of services to the consumer, would force significant changes in the way information service providers interact with customers and provide their services, and would likely have a negative economic impact on the pay per call industry. Given the fact that the statute already has created the means of ensuring sufficient consumer

¹⁵ NPRM at para. 42; proposed rule § 64.1501(b)(1).

protection, the Commission can avoid this bad policy result by simply following the statute.

b. Requiring That 800 Numbers Be Listed on Bills Received by Pay Per Call Customers Would Thwart Legislative Intent and Disserve Consumers.

A major component of the policy crafted by Congress in Section 228 involves the provision of information to consumers to enable them to make informed choices about the use of information services and also to protect them against erroneous billing for services they did not purchase.

The Commission's proposed requirement¹⁶ that 800 or other toll free numbers must be displayed on the customer's bill, when the customer has a presubscription agreement and has elected to pay for a pay per call service by means of the customer's telephone bill, misses the mark on two counts. First, the best means of providing useful information to the consumer would be to require that the number listed on the customer's bill is the number directly associated with the provision of the service purchased by the customer. Referencing the 800 number on the bill does not accomplish this result because no charge is imposed as a result of the customer's dialing the 800 number. The congressional policy reflected in the amendments to Section 228 is that providing relevant information to consumers is the best way to promote consumer choice and provide for consumer protection. The Commission's proposal does not advance this legislative policy.

A second problem with the Commission's approach is that it would actually result in confusing the customer, rather than providing useful information. There would likely

¹⁶ Proposed rule § 64.1501(c)(2).

be many instances in which customers would wonder why their call to an 800 number had resulted in a charge on their phone bill. This confusion would likely result in numerous inquiries and complaints to the local telephone company issuing the bill and to the information service provider. Making these inquiries and complaints would be an unnecessary burden and inconvenience for customers, and would also impose unwarranted costs on both the local telephone company and the pay per call service provider.

The Commission should abandon its proposed approach and instead require service providers to furnish information about the billed service that gives the customer a clear understanding of the nature and origin of the charge and also identifies the service provider.

c. Requiring Pre-Existing, Delivered Calling Cards Is Contrary to Consumer Preference, Industry Practice, and Congressional Intent.

The Commission's proposed rule Section 64.1501(b)(2)(i) requires calling cards to which information services are billed to be pre-existing and delivered prior to being utilized by a consumer. This proposed rule is contrary to consumer preference, industry practice, and congressional intent, and would significantly prohibit the delivery of many commonly used and valuable information services.

Initially, it should be noted that an enhanced information service provider cannot enforce or verify that a calling card is preexisting and has been physically delivered to the consumer. In fact, some calling cards currently issued do not fulfill the proposed

requirements that a calling card be pre-existing or delivered to the consumer prior to utilization.¹⁷

Regardless of whether a provider can verify that a calling card is preexisting and in the hands of the consumer, the Commission's proposed provision is incorrectly included as a presubscription or comparable arrangement. The proposed rule is directly contrary to the statutory scheme and would be invalid on its face, if adopted, due to the fact that the calling card exception is a separate exception from the presubscription exception, and therefore, is subject to different rights and responsibilities.

Furthermore, in the 1996 Act, Congress set forth very specific requirements for the two permitted methods of providing information services via 800 numbers and billing these services to a phone bill. As we have discussed above, the first method requires a written (including electronic) record of the terms and conditions to be sent to the consumer, but explicitly does not require execution of that agreement. The second method permits credit card and calling card charges, but only so long as there is a detailed disclosure of the terms, conditions and cost prior to a charge being levied on each call.

In its definition of calling cards, Congress did not deem it necessary to require a pre-existing agreement or written agreement nor did Congress find it necessary for an actual card to be issued. Rather, Congress simply stated that a calling card is an identifying number or code unique to the individual that is issued by a common carrier

¹⁷ At least one carrier offers its customers the choice of whether to receive a newly issued calling card in the mail. Thus, the consumer can choose whether he or she would like to receive a plastic card or to just write down his or her code.

and enables the individual to be charged by means of a phone bill for charges incurred independent of where the call originates.

It appears that Congress recognized that the issuance of calling cards, even “instant” calling cards, is a common practice in the industry. Rather than focus on requiring a plastic card to be delivered to the consumer, Congress appears to have been more focused on requiring full disclosure of all the costs, terms, and conditions prior to any charges being levied. While it may be a worthwhile practice to issue an actual card under some circumstances, the issuer should be permitted to extend credit under the card, using its fraud control mechanisms, and should be permitted to assume the risks of extending credit under a card immediately upon its issuance.¹⁸

This practice would be consistent with that now practiced by many on-line merchants and by stores issuing credit generally. Most department stores and many on-line companies provide instant credit without a card, and without issuing a charge card at the time the initial credit is issued. The providers of information services should not be relegated to outmoded and slower forms of credit issuance than ordinary in the normal chain of commerce, so long as they are willing to undertake the risk of the extending credit immediately upon issuance.

The Commission should rely on the detailed statutory definitions, prohibitions, and authorizations due to the fact that these regulations and protections have not been proven to be inadequate. At this time, there is no reason to depart from congressional

¹⁸ Pilgrim fails to understand why a phone company should not be permitted to issue an instant credit card when retail businesses partake in the same practice as a matter of routine.

intent and the statutory definition of calling card and forbid “instant” calling cards and require a card to be delivered prior to the assessment of any charges.

J. The Current System has Numerous Advantages and Should Not Be Amended.

The system currently in place has various advantages that will be discussed in the following paragraphs and should be carefully considered by the Commission before taking action on the proposed rules.

1. The Provision of Information Services Over 800 Numbers Offers Significant Advantages to Consumers Not Available Over 900 Numbers.

When information services are provided over 900 numbers, consumers are required to make a purchase decision almost immediately after dialing the number without opportunity to consider the terms and conditions of the service or to terminate the call without incurring charges. Prior to purchasing a service over a 900 number, the rules require only a brief preamble and beep tone.

In comparison, when information services are provided through 800 numbers, consumers are given the opportunity to shop through the services before making a decision whether to purchase. In many instances, the consumer can browse through and consider the services as long as they like and even disconnect without incurring any charges. Furthermore, information services dialed over 800 numbers and billed to a calling card provide the consumer with a very defined moment of purchase. When the consumer provides the telephone operator with his card number, the consumer makes a clear and conscious decision to purchase the information services and knows the moment in which he or she has transitioned from the shopping/browsing mode to the paid mode.

Thus, in an 800 call, the moment of purchase is much more clearly defined than in a 900 call.

2. Instant Calling Cards have Increasingly Become the Standard Industry Practice.

The Commission should not interfere with the industry practice of issuing calling cards over the telephone. In recent years, an impressive array of both local and long distance carriers issue calling cards instantly (or near instantly) over the telephone to their consumers. When the Commission failed to act after the July 1996 NPRM raised the issue of prohibiting instant credit cards, these carriers assumed that this was no longer a concern and continued to invest vast sums of money in the information and technology systems necessary to support quickly issuing calling cards and monitoring and controlling calling card usage and fraud. Carriers compete heavily on the ability to quickly fulfill their customers' needs, and instant calling cards are valuable consumer conveniences. There has not been abuse or fraud worthy of prohibiting this practice.

K. Due to Inefficiencies in the Systems, All Information Service Calls Should Not Be Required To Be Placed over 900 Numbers.

1. Changes in the Industry and Marketplace Have Destroyed the Use of 900 Numbers.

Many carriers have either stopped providing 900 number service altogether, or have ceased providing billing for 900 number service — effectively destroying the usefulness of the 900 number exchange. Changes in the telecommunications industry have also caused the 900 number exchange to be increasingly irrelevant. These changes have taken place since the Commission's original NPRM in this docket, and need to be addressed in a further NPRM. In any event, the effective loss of the 900 number

exchange should cause the Commission to focus on maintaining the viability of other dialing and billing options.

AT&T has announced that it was ceasing billing and collection for 900 number calls effective January 1, 2003, and will stop providing transport as of January 1, 2004. The result is that AT&T will terminate all 900 number services as of January 2004, and the numbers serviced by AT&T will be taken out of circulation at that time. As the Commission has never mandated 900 number portability, and it does not exist, any equity or ownership built up by the service providers under those numbers will be lost. AT&T's action, and the subsequent permanent loss of service, demonstrates that any system which relies heavily on 900 numbers is not viable, and cannot be substituted for the congressional mandates of 1996.

Cell phone penetration is also spelling a death knell for 900 number service. Contrary to the Commission's mandates regarding preemptive blocking of 900 numbers, cellular carriers do not permit connection to 900 numbers from phones. As the use of cell phones becomes more ubiquitous and replaces land line services, the potential reach of 900 numbers will narrow. This fact is particularly unfortunate as a consumer's control over a cell phone is greater than over a land line phone, and there is an initial assumption that all calls made from a cell phone are made or authorized by the owner of the phone, unlike the situation with land line phones. While liability for charges with cell phones is clearer, and consistent with the positive consumer acceptance of charges sought by the Commission for pay-per-call services, cell phones cannot be used to reach these services.

Finally, with the growth of competitive LECs in the industry, the problem of non-collectible 900 number charges within the industry has caused many providers to have to

go out of business. Most competitive LECs do not have and will not sign 900 number billing arrangements with carriers or providers, and providers have no way of determining whether a call is coming in from a competitive LEC or an incumbent LEC with 900 number billing agreements. The result is a sizeable increase in the number of non-billable calls, greatly increasing the cost of 900 number service and the charges to be levied on the smaller pool of consumers who access 900 numbers. All of these factors underscore the need for the Commission to preserve and expand the alternate delivery platforms enacted by Congress, and to codify its rulings regarding the division of common carrier and information services.

2. Blocking for 900 Number Access is Not Accessible to Any Party Other Than the LECs Serving the Customer.

The Commission's preference appears to be that all information service calls be placed over 900 numbers. At the same time, the provisions of Section 228 attest to Congress' determination that consumers should be able to block access to unwanted services. However, at this time, the blocking for 900 access is not accessible to any party other than the local exchange carrier serving the customer. Unlike other types of blocking, such as collect, long distance or third party billing, 900 blocking cannot be accessed over line information database (LIDB) lookup by carriers and others.

Until 900 blocking information is available to all carriers, LECs will continue and guarantee their monopoly over 900 number access and billing. Therefore, it is necessary both for expanded consumer protection and equal competition to make 900 blocking information available in LIDB. Such access would permit all carriers and service providers to check this listing to determine whether to extend credit or permit access, regardless of the dialing pattern used. Such access also would permit the Commission to

require polling for 900 blocking in LIDB prior to connecting a party to an information service. The polling could be done for the origination line if presubscription is being used, or could be on the line indicated on a line based calling card. At a service provider's option, this line also could be polled by credit card or debit card issuers to assist in fraud prevention.

3. Deficiencies of 900 Service Have Required Carriers to Create New Methods of Providing Information and Enhanced Services.

The new methods of providing information and enhanced services using dialing patterns other than 900 numbers are not substantially motivated by a desire to deceive the public, as the Commission believes. Rather, these alternative dialing patterns have evolved due to barriers created by the LECs and due to needs of consumers in the marketplace. The following paragraphs explain why carriers and service providers have been forced to use alternative dialing patterns to provide their services.

First, the majority of changes in calling patterns are driven by the deficiencies caused by the LEC's refusal to share information and their unreasonable control over billing and collection. For example, when 900 number billing is processed by the LECs, the LECs charge substantially higher rates for 900 transport and billing and collection services than for equivalent 800 and other transport and billing services. In addition, a number of carriers invoke content review restrictions of competitive carriers and service providers, and use the results of these content reviews to deny billing and collection and other services. Moreover, the LECs also engage in anticompetitive behavior by permitting a number of dialing and billing patterns over their own networks for a variety of information services while denying the same level of service to competing carriers and service providers for equivalent services.

A second reason that carriers and service providers avoid the use of 900 numbers and instead use other dialing patterns is due to the stigma attached to 900 numbers. Consumers often do not want to dial a 900 number regardless of the nature of the service desired due to the negative connotation attached to this number pattern.

A third reason that carriers and service providers have avoided the use of 900 services, is that those services can usually only be accessed from a caller's home telephone. This is especially important for a variety of telemessaging, voice store and forward and teleconferencing often used by business travelers, which are inaccessible over 900 numbers from hotels and pay phones.

Congress' creation of another means of providing information services over toll free numbers evolved, in part, due to a recognition of the problems associated with 900 number services, as indicated by industry trends driving carrier and service providers to other dialing options. At this time, the problems associated with 900 number services have not been resolved, and thus, all information services should not be required to be placed over 900 numbers.

4. Any Rule Requiring 800 Numbers to be Displayed on a Phone Bill for Information Services Must Be Accompanied by an Order Requiring LECs to Provide Billing and Collection Services for IXC's in the Required Format.

The majority of billing and collections contracts prohibit the type of billing required by Section 64.1510(c)(2), Billing and Collection of Pay-Per-Call and Similar Service Charges. Thus, any regulation which requires carrier and service providers to use this billing format in Section 64.1510(c)(2) must also be accompanied by an order from the Commission which requires the LECs to provide billing in the required format on a content and message neutral basis. Without such a companion order, competition will be

significantly decreased by barring small and mid-size carriers and service providers from offering this type of information service at all while giving LECs and large carriers great advantages.

L. Specific Suggested Rule Language

In our previously filed comments we developed and recommended certain language changes to the rules. We tentatively propose those same changes again, without restating them here. Given the changes which have taken place in the industry over the past seven years, however, and the recent legal interpretations we have reviewed herein, we will want to refine our original suggestions after reviewing the comments filed by all other parties. We will be proposing refined language suggestions with our reply comments in this docket.

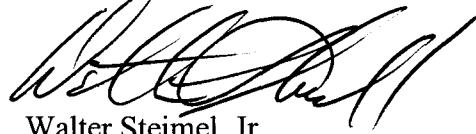
III. CONCLUSION

While much has changed since the Commission issued its NPRM in this proceeding nearly seven years ago, one fact has remained the same — the rules proposed by the Commission in 1996 contain many significant provisions that are inconsistent with Section 228 and legislative intent, that would impair consumer choice and cause unnecessary customer confusion in the use of pay per call services, and that would impose unwarranted and crippling requirements and restrictions on information service providers.

Pilgrim respectfully urges the Commission to revisit its proposed rules and, based upon the record in this proceeding, issue a Further NPRM that achieves the required consistency with the statute and congressional policies and promotes a level playing field for all players in the highly competitive information services industry. A key focus for the Commission should be to address matters such as the provision of 900 blocking

information and the provision of billing and collection by LECs to information service providers. Solutions to these problems will benefit consumers and remove marketplace distortions so that competitive forces can shape the provision of information services.

Respectfully submitted:

A handwritten signature in black ink, appearing to read 'Walter Steimel, Jr.', written over a horizontal line.

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May 12, 2003